BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY L. GOTCHALL Claimant VS. **SCHWAN'S GLOBAL SUPPLY CHAIN, INC.** Respondent AND **HARTFORD INS CO OF MIDWEST** Insurance Carrier	)	Docket No. 1,039,143

ORDER

Respondent and its carrier (collectively referred to as respondent) request review of the December 9, 2009 Order for Medical Treatment entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

The ALJ granted claimant's request for medical treatment to his shoulder after concluding that claimant sustained his burden of proving that he sustained an accidental injury arising out of and in the course of his employment on December 20, 2007. The ALJ also denied respondent's Motion to Dismiss.

The respondent requests review of both these findings. Respondent asserts that claimant is inappropriately attempting to override an [earlier] Appeals Board decision which denied claimant's claim. Thus, respondent argues the ALJ erred when she failed to dismiss claimant's preliminary hearing request. Respondent also contends that claimant's recently refashioned testimony as to the date of his accident is, at best, self-serving, and should be disregarded. Respondent maintains that claimant has failed to meet his evidentiary burden in this matter, both as to the existence of a compensable injury and as to timely notice of that claim, and all benefits should be denied.

Claimant argues that the ALJ should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second time this claim has come before the Board.[1] Given the significant detail contained within the Board's earlier Order, the underlying facts and circumstances will not be restated but merely adopted herein. The additional testimony presented at the most recent preliminary hearing will be summarized as necessary to explain this member's ruling.

Following a preliminary hearing in August 2008, the ALJ denied claimant's claim as she concluded that claimant had failed to establish that he sustained an accidental injury while in respondent's employ on December 27, 2007. The sole focus in that hearing was on the fact that claimant adamantly maintained his accident occurred while unloading a truck on December 27, 2007. But when respondent produced certain records, it became clear that no trucks were unloaded on that date and consequently, the accident could not have occurred as he said. Further discovery was held and an amended Application for Hearing was filed which modified the date of accident to "on or about December 27, 2007."

A second preliminary hearing was held after additional discovery was completed. Following that hearing the ALJ concluded claimant's evidence established a compensable claim occurred on December 20, 2007, a date that a truck was, in fact, being unloaded during claimant's shift. Thus, she ordered respondent to provide medical treatment to claimant's shoulder.

That Order was appealed to the Board and one member determined that the record, as developed, did not support an accidental injury occurred on either December 20 or 27, 2007. That member's rationale was as follows:

> Claimant testified at the preliminary hearing that he injured his left shoulder at work on December 27, 2007. This is also what he told his supervisors on January 14, 2008, when he asked for medical treatment. He testified that he reported his injury to his supervisor, Scott Vinduska, the next day on December 28, 2007, and again on December 30, 2007. The employer authorized claimant to see Dr. Niblock. The Injury Form signed by claimant shows a date of injury of December 27, 2007.[2] In fact, all of the medical records introduced into evidence at the August 11, 2008, preliminary hearing show an injury date of December 27, 2007. Claimant never testified he was injured on December 20, 2007. Claimant said that the time of day he was injured was an estimate, but he never said he could be mistaken about the day of the month. Claimant only testified that he was injured on December 27, 2007.

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[1] Board Order, 2009 WL 1314328 (WCAB Apr. 20, 2009).

[2] P.H. Trans. [Aug. 11, 2008],Cl. Ex. 1, the January 17, 2008, record of admission from Citizens Medical Center, shows a "Prev Adm Date 12/26/07."

> The evidence that claimant was injured on December 27, 2007, was contradicted by the evidence that claimant was not at work at 5 p.m. on December 27, 2007, and, more significantly, that no trucks were unloaded on December 27, 2007. There is no testimony in this record that claimant was injured at work on December 20, 2007.[3]

Thereafter, claimant requested a third preliminary hearing. In response to this request, respondent filed a Motion to Dismiss. In essence, respondent asserted that at this hearing, he offered testimony in an attempt to explain why he now believes his accident occurred on December 20, 2007 rather than December 27, 2007. The ALJ denied respondent's Motion to Dismiss and after considering the claimant's testimony and found as follows:

> That claimant filed a 3rd application for a preliminary hearing requesting medical treatment in the form of shoulder surgery. That he testified that he must have been mistaken when he originally testified that his date of accident was December 27, 2007. That his injury occurred while he was unloading a truck. That he has since looked at load logs and there were trucks unloaded on December 20, 2007 and January 3, 2008. That the accident had to have happened on December 20, 2007 as it was close to a holiday. That it could have happened on January 3, 2008, but he believes it was December 20, 2007. Based on this new and additional testimony, it is found that the claimant has adequately explained his mistake and it is found that he has proven that he met with personal injury by accident arising out of and in the course of his employment on or about December 27, 2007. Further, the claimant has always testified that he gave notice of his injury the day after his accident, he simply had the wrong date of accident and therefore it is found that the claimant gave timely notice of his accident. The [c]laimant's request for medical treatment in the form of shoulder surgery should be and the same is hereby granted and is ordered to be provided and paid for by the [r]espondent and its [i]nsurance [c]arrier.[4]

Respondent appealed this decision alleging the ALJ erred in failing to grant its motion to dismiss and in concluding that claimant established a compensable injury.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

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[3] *Id.* at 5.

[4] ALJ Order (Dec. 9, 2009).

[5] K.S.A. 2007 Supp. 44-501(a).

[6] K.S.A. 2007 Supp. 44-508(g).

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

Simply put, respondent contends that claimant's credibility is so damaged that he is not to be believed. Accordingly, his contentions that he was injured on December 20, 2007 while in respondent's employ should not be believed and his repeated requests for benefits should be denied. This member of the Board has carefully considered the entire record and concludes the ALJ's Order should be affirmed.

Claimant initially asserted that his accident occurred on December 27, 2007. And when that date was not corroborated by the surrounding facts, he offered additional testimony, now contending that the accident occurred one week earlier, on December 20, 2007. The ALJ had the opportunity evaluate claimant's demeanor, listening to his testimony on at least two occasions. She ultimately came to the conclusion that his explanation for why he believed he was injured first, on the 27th and then determined it was on the 20th was credible. Moreover, it is worth noting that respondent does not deny the existence of the accident. Rather, respondent contends that claimant failed to give timely notice and has altered his testimony to fit the corroborating documentation. Under these facts and circumstances, this Board Member finds the ALJ's conclusion that claimant established an accidental injury arising out of and in the course of claimant's employment on December 20, 2007 is affirmed.

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[7] K.S.A. 2007 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[9] *Id.*

Similarly, the ALJ noted that "claimant has always testified that he gave notice of his injury the day after his accident".[10] This finding is absolutely accurate. Claimant testified that he told his supervisor, Mr. Vinduska, of the accident the day after his accident and that he was ignored. Mr. Vinduska recalled that a few days after the truck was unloaded claimant complained of shoulder pain while the two were at work, but that he failed to ask claimant any follow up questions.[11] Thus, while the date claimant initially chose was wrong, both he and Mr. Vinduska consistently recall claimant complaining of injury to his shoulder a few days after the truck was unloaded.

The purpose of notice is to afford the employer an opportunity to investigate the claim.[12] Claimant provided notice and respondent (through Mr. Vinduska) chose not to follow up or investigate. Like the ALJ, this member finds the claimant established that he gave timely notice of his December 20, 2007 accident.

As for the respondent's Motion to Dismiss, respondent does not allege the ALJ exceeded her jurisdiction. Rather, respondent contends the issues in this third preliminary hearing were the same as the earlier two with no new *"evidence"*[13] and the ALJ should have simply denied claimant's request for preliminary hearing benefits.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;
(2) Whether the injury arose out of and in the course of the employee's employment;
(3) Whether notice is given or claim timely made;
(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[14]

As noted above, respondent has not alleged the ALJ exceeded her jurisdiction in allowing claimant to proceed to a third preliminary hearing. Rather, respondent contends

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[10] ALJ Order (Dec. 7, 2009).

[11] P.H. Trans. (Aug. 11, 2008) at 19.

[12] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[13] Respondent's Brief at 11 (filed Dec. 20, 2009) (emphasis in original).

[14] See K.S.A. 44-551.

that claimant is merely rehashing the same evidence in the hopes of achieving a different outcome.

To be clear, an ALJ has the authority to oversee her docket and manage the caseload.[15] And there is no limit to the number of preliminary hearings party can request. More importantly, none of the jurisdictional bases are present in this appeal in connection with respondent's contention that its Motion to Dismiss should have been granted. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[16] Accordingly, respondent's appeal is dismissed as to the ALJ's decision to deny the Motion to Dismiss.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[17] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated December 9, 2009, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of February 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Mickey W. Moiser/Paula Wright, Attorneys for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

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[15] *Bagby v. Prairie Village Animal Hospital*, No. 1,020,548, 2005 WL 1983415 (Kan. WCAB July 15, 2005).

[16] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[17] K.S.A. 44-534a.